# Jurisdictional Statement

81-367

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No. _____

# In the Supreme Court of the United States

OCTOBER TERM, 1981

MARVIN NEILSON,
*Appellant,*

VERSUS

STATE OF OKLAHOMA,
Appellee.

## JURISDICTIONAL STATEMENT

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August, 1981

## QUESTION PRESENTED

Does an Oklahoma statutory scheme and practice which permits significantly lesser punishment, *i.e.*, a suspended or deferred sentence only to those defendants who are willing to waive trial by jury, violate the Fourteenth Amendment guarantees of due process including the right not to plead guilty and the constitutional right to demand a jury trial?

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No. .....

# In the
# Supreme Court of the United States
OCTOBER TERM, 1981

MARVIN NEILSON,
*Appellant,*

VERSUS

UNITED STATES OF AMERICA,
*Appellee.*

## JURISDICTIONAL STATEMENT

Appellant, Marvin Neilson, appeals from a judgment of the Oklahoma Court of Criminal Appeals entered on June 23, 1981, affirming the conviction of appellant for unlawful distribution of marijuana. Should this Court determine the appeal was improvidently taken, we ask these papers be treated as a Petition for Writ of Certiorari, pursuant to 28 U.S.C. § 2103.

## CITATION TO REPORTED OPINION

The opinion of the Oklahoma Court of Criminal Appeals and the order denying the petition for rehearing are not published in the official reports, but are included as Appendices A and B to this Jurisdictional Statement.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(2). The opinion of the Oklahoma Court of Criminal Appeals was entered on May 27, 1981 and the Petition for Rehearing was denied on June 23, 1981. The notice of appeal was filed on August 14, 1981, with the Oklahoma Court of Criminal Appeals. Appellant requests this Court also to consider these papers as a Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals, pursuant to 28 U.S.C. § 2103, should the Court determine the appeal is improvidently taken.

## STATUTES INVOLVED IN THE APPEAL

22 O.S. 1971 § 926.

> "In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided." R.L.1910, § 5933.

22 O.S. 1971 § 991c.

> "Upon a verdict or plea of guilty, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation under the supervision of the State Department of Corrections upon the conditions of probation prescribed by the court. The court shall first consider restitution, administered in accordance with the provisions pertaining to restitution set forth above, among the various conditions of probation it may prescribe.

Upon completion of the probation term, which probation term under this procedure shall not exceed two (2) years, the defendant shall be discharged without a court judgment of guilt, and the verdict or plea of guilty shall be expunged from the record and said charge shall be dismissed with prejudice to any further action. Upon violation of the conditions of probation, the court may enter a judgment of guilt and proceed as provided in Section 991a of this title. The deferred judgment procedure described in this section shall only apply to defendants not having been previously convicted of a felony."

63 O.S. 1971 § 2-401.

"A. Except as authorized by this act, it shall be unlawful for any person:

"1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;

2. To create, distribute, or possess with intent to distribute, a counterfeit controlled dangerous substance.

"B. Any person who violates this section with respect to:

"1. A substance classified in Schedule I or II which is a narcotic drug or lysergic and diethylamide (LSD) is guilty of a felony and shall be sentenced to a term of imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation except where the conviction is for a first offense. The provisions of this paragraph shall be applicable to all cases under this paragraph whether or not judgment and sentence on the effective date of this act have become final.

"2. Any other controlled dangerous substance classified in Schedule I, II, III, or IV is guilty of a felony and shall be sentenced to a term of imprisonment for not less than two (2) years nor more than ten (10) years and a fine of not more than Five Thousand Dollars ($5,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation except where the conviction is for a first offense. The provisions of this paragraph shall be applicable to all cases under this paragraph whether or not judgment and sentence on the effective date of this act have become final.

"3. A substance classified in Schedule V is guilty of a felony and shall be sentenced to a term of imprisonment for not more than five (5) years and a fine of not more than One Thousand Dollars ($1,000.00).

"C. Any person convicted of a second or subsequent violation of this section is punishable by a term of imprisonment twice that otherwise authorized and by twice the fine otherwise authorized. Convictions for second or subsequent violations of this section shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation.

"D. Any person who is at least twenty-one (21) years of age and who violates this section by distributing a controlled dangerous substance to a person under eighteen (18) years of age is punishable by twice the fine and by twice the imprisonment otherwise authorized."

22 O.S. 1971 § 991a.

"A. Whenever a person is convicted of a crime and no death sentence is imposed, the court shall either:

"1. Suspend the execution of sentence in whole or in part, with or without probation. The court may, at time of sentencing or at any time during the suspended sentence, in addition:

a. order restitution to the victim according to a schedule of payments established by the sentencing court if the defendant agrees to pay such restitution or, in the opinion of the court, if he is able to pay such restitution without imposing manifest hardship on the defendant or his immediate family and if the extent of the damage to the victim is determinable with reasonable certainty, and/or

b. order the person convicted to engage in a term of community service without compensation, according to a schedule consistent with the employment and family responsibilities of the person convicted.

"Provided, however, that any such order for restitution and/or service shall be made in conjunction with probation and will be made a condition of the suspended sentence, or

"2. Impose a fine prescribed by law for the offense, with or without probation or commitment and with or without restitution or service as set forth above; or

"3. Commit such person for confinement provided for by law.

"B. In sentencing a person convicted of a crime, the court shall first consider a restitution program for the victim as well as imposition of a fine or incarcertation of the offender. Provided, that paragraph 1 of subsection A of this section shall not apply to persons being sentenced upon their third or subsequent to their third conviction of a felony.

"C. Probation, as used in subsection A of this section, is a procedure under which a defendant, found guilty of a crime, is released by the court subject to the supervision of the Department of Corrections. Such supervision shall be initiated upon an order of probation from the court, and such supervision shall not exceed two (2) years. Provided that, such supervision may be extended for a period not to exceed the expir-

ation of the maximum term or terms of the sentence upon a determination by the Division of Community Services of the Department of Corrections, that the best interests of the public and the release will be served by an extended period of supervision.

"D. The Department of Corrections shall be responsible for the monitoring and administration of the restitution and service programs provided by subsection A of this section, and shall insure that restitution payments are forwarded to the victim and that service assignments are properly performed."

## STATEMENT

The appellant and his wife were arrested and charged with unlawful delivery of marijuana in violation of 63 O.S. 1971 § 2-401. The wife was acquitted, but the appellant was convicted. The jury assessed appellant's punishment at two years' imprisonment, the minimum time to serve under Oklahoma Statutes for the offense for which appellant was convicted. 63 O.S. 1971 § 2-401.

Although Oklahoma law requires the trial judge to instruct the jury fully on all penalties relative to the crime for which the defendant has been charged, *Thompson* v. *State*, 462 P.2d 299 (Okl.Cr. 1969), the trial court did not instruct the jury that it could suspend the time portion of the sentence imposed or defer imposition of sentence.[1] Un-

[1] A suspended sentence is, of course, the imposition of a sentence, the time portion of which is suspended. A deferred sentence means simply that the imposition of sentence is deferred, under Oklahoma law, during a two-year period of probation. If the defendant does not violate any of the rules of probation, the finding of guilt is vacated, a plea of not guilty entered, and the case dismissed and the record expunged. 22 O.S. 1971 § 991(c), infra.

der Oklahoma law it is expressly prohibited from doing so, *Williams* v. *State,* 485 P.2d 475 (Okl.Cr. 1971); *Riddle* v. *State,* 374 P.2d 634 (Okl.Cr. 1962).

Oklahoma law provides the jury may assess the punishment upon request of the defendant (in practice, this is routinely done, even in the absence of a request). 22 O.S. 1971 § 926. Once the jury assesses punishment, punishment is formally imposed by the trial court. 22 O.S. 1971 § 961.

The result of this statutory scheme is that a defendant who waives trial by jury (assuming the State also waives jury trial) has his case judged by a trier of fact who is knowledgeable that the defendant may be considered for a suspended or a deferred sentence. The same is true for a defendant who pleads guilty or *nolo contendere;* the judge before whom he appears is aware of all sentencing options. In theory, the trial court may reduce, but not increase, the punishment imposed by the jury. In Oklahoma, in practice, this almost never happens (See discussion under Why the Question is Substantial). *Significant statistical evidence exists concerning Oklahoma sentencing procedures which demonstrate conclusively that a defendant who elects to have his case tried by a jury and have the jury assess punishment, will not have the trial court impose either a suspended or a deferred sentence.* Such a statutory scheme which, in effect, requires a defendant to waive his right to a less harsh sentence in return for exercising his right to a jury trial, is a violation of the Fourteenth Amendment to the United States Constitution.

Appellant elected trial by jury, and although he did not request the jury to set punishment, it did. At the time

of formal sentencing, his counsel raised specifically the issue that the Oklahoma prohibition against giving the jury the right to assess a suspended or deferred sentence was a violation of the Fourteenth Amendment:

> "I would incorporate in the event the court overrules the motion for new trial and our presentation with respect to sentencing, and that is that it is a violation of the defendant's Fourteenth Amendment rights under the constitution to exclude from the jury knowledge that the jury could recommend to the court a suspended sentence or a deferred sentence." (T. p. 102)

The trial court refused to impose a suspended or deferred sentence after overruling the motion for new trial.

On appeal, the appellant again raised the same issue to the Oklahoma Court of Criminal Appeals in Proposition VI of his brief (Appellant's Brief, pp. 57-62). Also, appellant argued that a statutory right to consideration of a suspended or deferred sentence created a liberty interest protected by the Fourtenth Amendment to the Constitution (Appllant's Brief, p. 62). The same argument was presented in the petition for rehearing with the Oklahoma Court of Criminal Appeals:

> "The court's failure to instruct the jury properly on Neilson's eligibility for a suspended or deferred sentence violated his Fourteenth Amendment right to due process of law because it seriously infringed on his right to liberty." (Appellant's Petition for Rehearing, p. 2)

The trial court overruled the motion for new trial without specifically addressing the Fourteenth Amendment issue even though it had been raised (T. 112-114). The Okla-

homa Court of Criminal Appeals did not address the appellant's Fourteenth Amendment claim, even though it was specifically raised. In the order denying the petition for rehearing, the court again refused to address the appellant's Fourteenth Amendment claims, even though they had been raised in detail in a five (5) page petition for rehearing. Appellant's position is that the provisions of 22 O.S. 1971 §§ 926, 991(a) and (c) and 63 O.S. 1971 § 2-401 as applied, violate the Fourteenth Amendment to the United States Constitution.

## WHY THE QUESTION IS SUBSTANTIAL

The Oklahoma procedure permits a system as applied whereby the option of a significantly lesser punishment, *i.e.* ,a suspended or deferred sentence, is available only to those defendants who are willing to waive trial by jury or waive the jury assessing punishment. The inevitable effect of any such provision is, of course, to discourage assertion of the right not to plead guilty and to deter exercise of the constitutional right to demand a jury trial. In this sense, the Oklahoma statutory scheme has the same defect this Court perceived in the Federal Kidnapping Statute, *United States* v. *Jackson,* 390 U.S. 570, 581 (1968).

It has long been recognized that a more harsh sentence cannot be visited upon the convicted defendant merely because he elected to stand on the plea of not guilty and either assert his innocence or put the State to the burden of proving him guilty. *United States* v. *Wiley,* 278 F.2d 500 (2d Cir. 1950); *People* v. *Jones,* 87 Cal. App. 482, 262 P. 361 (1927); *United States* v. *Maples,* 501 F.2d 985 at 987; *United*

*States ex rel. Starner* v. *Russell*, 260 F.Supp. 265, *rev'd* at 378 F.2d 808, *cert. den.* 389 U.S. 889, *reh. den.* 389 U.S. 997 (D.C. Pa. 1966).

**There is substantial statistical and historical evidence to support our conclusion that in Oklahoma a defendant who exercises his constitutional right for a jury trial and is convicted, will not receive a deferred or suspended sentence from the judge, but there is a significant chance that he will receive such consideration if he is willing to waive trial by jury.**

Referencing a 1974 study[2] the Oklahoma Center for Criminal Justice, in a recent publication,[3] noted that the deferred sentencing procedure,

> ". . . [w]as used for 2,801 persons or 36.3 percent of the eligible defendants who entered guilty pleas in the State of Oklahoma. Unfortunately, it was used in only six felony findings which went to trial." (At 32)

The inequitable application in the deferred sentencing procedure is clear; 2,800 defendants were given deferred sentences upon a plea of guilty; of those defendants who chose to go to trial, only six were granted deferred sentences.

These statistics clearly established that Sections 991(a) and (c) are applied in a manner which violates the Equal Protection and Due Process Clauses of the Fourteenth

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[2] *Effectiveness of the Deferred Judgment Procedure in Oklahoma*, Oklahoma Center for Criminal Justice, 1974, unpublished.

[3] *Oklahoma Felony Sentencing Practices*, Oklahoma Center for Criminal Justice, 1978; publisher, Oklahoma State Board of Affairs, Central Printing Division.

Amendment, and the only reasonable inference from such statistics, that can be drawn with regard to a defendant's Sixth Amendment right, is that the exercise of the right to trial by jury is seriously and actively discouraged.

This conclusion finds further clear and unequivocal support in a 1970 study conducted by the Commission on Representation of Indigents Accused of Crimes.[4] This study included an analysis of every felony filed in the State of Oklahoma between January 13, 1969 to January 31, 1970, in which the defendant appeared. Thus, the title of the study is misleading since it indicates that it is an analysis of felonies filed against indigent defendants only. To be sure, the study does contan an analysis of indigent defendants; however, the data includes *all* felonies filed during the study period regardless of economic status.

The data is as shocking as the data obtained five years later, in the 1974 study: Of the 6,022 defendants who entered a plea of guilty, 39.4 percent were granted deferred sentences and 23.2 percent received probation or a suspended sentence. In stark contrast, of the 668 defendants who chose to exercise their Sixth Amendment right to trial by jury, 1.7 percent received deferred sentences and 8.9 percent received a suspended sentence.

The statute which establishes the penalty for the crime for which Neilson was convicted, specifically provides that first offenders are eligible for deferred and suspended sentences. Title 63 O.S. § 2-401(B)(1). Because the statute

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[4] *An Analysis concerning the representation of indigents accused of crimes in Oklahoma,* Commission on Representation of Indigents Accused of Crimes, 1971; publisher, Oklahoma Center for Criminal Justice.

establishing the penalty for which the appellant was convicted provides eligibility for deferred or suspended sentence for first offenders, this eligibility is a part of the penalty and therefore must be covered by the trial court's instructions to the jury. *Cason* v. *State*, 159 Fla. 294, 31 So.2d 274 (1947); *Mercy* v. *State*, 286 S.W. 871 (1926). Since this was appellant's first conviction he was therefore eligible to receive a deferred or suspended sentence. Accordingly, the trial court erred when it failed to instruct the jury that the jury could assess, suspend or defer, the sentence set by the jury in its verdict upon a finding of guilt. However, the trial judge could not so instruct the jury, because 22 O.S. 1971 § 926 as construed, prohibits such instruction. *State* v. *Williams*, supra.

Indeed, it is readily apparent that there is an excellent chance that the trial jury would have recommended a deferred or suspended sentence had it known it could assess such punishment. After all, the jury imposed the absolute minimum sentence that it could assess under the instructions given to it by the trial court, and it found appellant's wife not guilty. These two incidents are strong evidence that the jury would have, had it been properly instructed in accordance with the Fourteenth Amendment, recommended a suspended or deferred sentence for appellant.

The court's failure to instruct the jury properly on Neilson's eligibility for a suspended or deferred sentence, violated his Fourteenth Amendment right to due process of law, because it seriously infringed on his right to liberty. In a plurality opinion written by Justice Stevens, this Court held that the requirements of due process now apply to

the sentencing process. *Gardner* v. *Florida*, 430 U.S. 349, 357-58 (1977). In reaching this conclusion, this Court cited *Mempa* v. *Rhay*, 389 U.S. 128 (1967) and *Specht* v. *Patterson*, 386 U.S. 605 (1967), to support the proposition that sentencing is a critical stage of the criminal proceeding during which the defendant is entitled to counsel, and *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), to support the assertion that a defendant has an "interest in the character of the procedure which leads to the imposition of sentence." 430 U.S. at 358. These decisions were read as a foundation for this Court's determination to apply the requirements of due process to sentencing.

Justice Stevens' broad assertion that all sentencing is subject to due process, clearly implies that a defendant's interests in not being imprisoned or fined, fall within the ambut of constitutional protection.

In its opinion, the Oklahoma Court of Criminal Appeals stated no counterbalancing State interest which might justify denying a defendant's liberty interest in sentencing procedures. This Court's decision in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), illustrates that a defendant's liberty interest can outweigh a state's interest in its criminal procedures. The *Morrissey* court examined the question whether a probationer has a sufficient liberty interest in his probation to evoke the protection afforded under the Fourteenth Amendment due process clause. The Court concluded that the indeterminate liberty of a parolee included many of the "core values of unqualified liberty and was protected by the Fourteenth Amendment." 408 U.S. 482. The Court felt that a parolee's liberty, though conditioned by parole restrictions, enabled him to be with family and

friends and to engage in gainful employment, and determined that these and other interests outweighed the state interests in being able to revoke parole without any procedural guarantees.

However, a defendant who has not yet been convicted or sentenced, has a stronger liberty interest than a parolee, while the interests of society and of the state at this stage are similar to their interests in parole revocation. A defendant in this category thus has all the liberty interests identified by the *Morrissey* Court but is in *a stronger position* because *no authority yet has found it necessary to incarcertate him.* Since the court could fine the defendant or place him on probation as easily as it could imprison him, a defendant's interest in not being deprived of his liberty at all, is greater than the interest of a parolee whose liberty is already restricted. Thus, the value of a jury's recommendation for a suspended or deferred sentence is clear. This Court has already tacitly recognized the stronger interest by requiring counsel at all initial sentencings but not at all parole revocations. Compare *Mempa* v. *Rhay,* supra, with *Gagnon* v. *Scarpelli,* 411 U.S. 778 at 783-91 (1973). This stronger liberty interest at stake in initial sentencings is clearly deserving of Fourteenth Amendment due process protection. Accordingly, the trial court's failure to properly instruct the jury on the penalty established in Title 63 O.S. § 2-401(B)(1) violated the appellant's constitutional right to due process of law.

## CONCLUSION

The appellant prays that the Court accept this appeal, or in the alternative, that it treat this jurisdictional statement as a petition for certiorari under the provisions of 28 U.S.C. § 2103, and, after argument, vacate the judgment of the Oklahoma Court of Criminal Appeals and remand the case for a new trial with instructions that the jury be informed by the trial court that it may assess, if it finds the defendant guilty, a suspended or deferred sentence.

Respectfully submitted,

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*Attorney for Appellant*

August, 1981

**CERTIFICATE OF SERVICE**

This is to certify, that I, Stephen Jones, Attorney for Appellant, have made service of this Jurisdictional Statement, by placing three (3) copies of same in the U. S. Mail, postage fully prepaid, this ..... day of August, 1981, to the following named below:

Attorney General of Oklahoma
Room 112, State Capitol Building
Oklahoma City, Oklahoma 73105

All parties required to be served have been served.

_____

Stephen Jones

# APPENDIX

[Filed in the Court of Criminal Appeals of the State of Oklahoma, May 27, 1981]

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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| MARVIN NEILSON, Appellant, | ) | |
| -vs- | ) | No. F-79-200 |
| THE STATE OF OKLAHOMA, Appellee. | ) | |

## OPINION

BRETT, Presiding Judge:

The appellant was arrested and charged with Unlawful Delivery of Marijuana in violation of 63 O.S. 1971, § 2-401, several days after he had sold marijuana to a police informant. The informant had been sent to the appellant's mobile home by the district attorney for the sole purpose of attempting to purchase marijuana. The appellant was convicted by a jury in the District Court of Grant County, Oklahoma, Case No. CRF-78-4, and he was sentenced to two (2) years' imprisonment.

In his first two assignments of error, appellant maintains that he should have been acquitted because the defense of entrapment was clearly established at trial. This Court has said that: " 'Entrapment' is the planning of an offense by an officer, or is [sic] someone acting under his direction and his procurement by improper inducement of its commission *by one who would not have perpetrated it, except for the trickery of the officer.*" (Citations omitted) *Robinson* v. *State*, 507 P.2d 1296 (Okl.Cr.1973), at 1299. The record reveals that the informant's act of procuring marijuana from the appellant did not constitute entrapment. Further, an entrapment defense must follow admission to the act charged. The simultaneous assertion of

improper inducement to commit a crime and denial of having committed the act negates the entrapment defense. The appellant failed to adequately assert entrapment at trial. Not only did he fail to admit selling marijuana to the informant, he persisted in maintaining that the informant had tried to sell marijuana to him. The first reference to entrapment came during defense counsel's closing argument.

As his second attempt to establish entrapment, the appellant argues that, because the police persuaded the informant to secure the evidence, entrapment was established. Contrary to the appellant's argument, however, the fact that the police persuaded the informant to secure the evidence is irrelevant.

In his fourth proposition of error, it is argued that the court erred when it granted the State's motion to strike the testimony of Floyd Young, the appellant's employer, on the ground that the character evidence he provided was not based on community reputation. On cross-examination, the following testimony was given by Mr. Young:

Q: But, as far as the general reputation in the community, you are not basing it, your testimony, on that, are you? You are basing it on your personal knowledge?

A: Personal knowledge is all I have to go by.

Q: Not reputation in the community?

A: Well, I don't know of any other reputation.

A character witness is required to base his testimony on general reputation rather than personal opinion. *McDonald v. State*, 317 P.2d 775 (Okl.Cr.1957).[1] Mr. Young testified that he did not know of any reputation other than of his personal knowledge. Since he could not testify as

[1] The New Evidence Code, which was not effective as of the date of this trial, has codified this rule, 12 O.S.Supp.1980, § 2803(21).

to appellant's community reputation, the trial court correctly excluded his testimony from the consideration of the jurors.

It is next contended that the appellant was denied competent assistance of counsel, which allegation he supports with acts allegedly reflecting this ineffectiveness. The standard by which this claim has been reviewed was recently promulgated in *Johnson* v. *State*, 620 P.2d 1311 (Okl. Cr.1980). In *Johnson*, this Court abandoned the sham and mockery test and adopted that of reasonably competent assistance of counsel, which had been adopted by the Tenth Circuit Court of Appeals. See *Dyer* v. *Crisp*, 613 F.2d 275 (10thCir.1980).

The appellant's allegation of inadequate representation at trial is not supported by the record. He first charges that his attorney failed to adequately prepare or investigate relevant facts and law, but the transcript of the trial indicates that the preparation was adequate. He then finds error in the failure of counsel to rehabilitate Mr. Young's testimony. However, trial tactics are not indicative of incompetence. Finally, the appellant argues that his attorney did not adequately develop the evidence of entrapment at trial and failed to submit requested instructions placing the State under the burden of proving beyond a reasonable doubt that he was not entrapped. But, since the record clearly indicates that there was no entrapment, any alleged defect in the development of that defense or failure to request certain instructions is irrelevant. It is the opinion of this Court that the conduct and assistance of counsel was reasonably competent.

It is next urged that the circumstantial evidence was insufficient to sustain the verdict of guilt. It has long been recognized that a criminal case may be proved circumstantially and that the jury has the exclusive province of applying the evidence. *Logan* v. *State*, 493 P.2d 842 (Okl.Cr. 1972). This Court's only concern is whether a prima facie case was established justifying submission of the case to the jury. *Renfro* v. *State*, 607 P.2d 703 (Okl.Cr.1980).

The evidence presented in the instant case reveals that a prima facie case was established. The police searched both the informant and his car for marijuana before he drove to the appellant's house. The officers followed him there and then waited outside for him. When he came out, he was followed again to a place where he stopped and gave the officers two baggies of marijuana. Also, the informant gave direct testimony that the appellant sold him the marijuana. This evidence is sufficient to establish a prima facie case, and it was properly submited to the jury, whose decision will not be reversed on appeal.

Finally, we consider the appellant's argument in assignments number three and six that the trial court erred in not instructing the jury that it could recommend a deferred or suspended sentence, and that the court abused its discretion in refusing to grant a deferred or suspended sentence.

The jury's province is the determination of fact involving the guilt or innocence of the accused. It is not the jury's duty to determine whether or not to suspend or defer a sentence. *Miller* v. *State*, 522 P.2d 642 (Okl.Cr.1974). The court makes this determination on factors outside the realm of the jury's consideration, and, thus, there is no basis for the trial court to instruct the jury regarding a recommendation of a suspended sentence.

It has long been the rule that this Court will not interfere with the decision of the trial court to deny a suspended sentence in the absence of an abuse of discretion. *Mixon* v. *State*, 549 P.2d 362 (Okl.Cr.1976); *Babb* v. *State*, 532 P.2d 477 (Okl.Cr.1975). However, the evidence before this trial court amply supported a suspended sentence. The appellant, a first offender, was married, a father, and was employed at the time of trial. There does not appear to be a compelling need to remove him from the community. The appellant is advised to consider the provisions of 22 O.S. Supp.1980, § 994, and to apply again for a suspended sentence under those provisions. In reconsidering his appli-

cation for a suspended sentence, the trial court may be persuaded by his conduct during the time he has been free on bond, pending the disposition of this appeal.

The judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
GRANT COUNTY, OKLAHOMA
THE HONORABLE J. RUSSELL SWANSON, JUDGE

MARVIN NEILSON, appellant, was convicted in the District Court of Grant County, Oklahoma, case no. CRF-78-4, of Unlawful Distribution of Marijuana and punishment set at two (2) years' imprisonment and appeals. AFFIRMED.

STEPHEN JONES,
ENID, OKLAHOMA,
Attorney for Appellant,

JAN ERIC CARTWRIGHT,
ATTORNEY GENERAL,
DAVID W. LEE,
ASSISTANT ATTORNEY GENERAL,
CHIEF, CRIMINAL DIVISION,
MICHAEL LEE BARDRICK,
LEGAL INTERN,
STATE OF OKLAHOMA,
Attorneys for Appellee.

OPINION BY BRETT, P.J.
CORNISH, J., CONCURS
BUSSEY, J., SPECIALLY CONCURRING

BUSSEY, J., SPECIALLY CONCURRING:

While I agree that the judgment and sentence should be affirmed, I am not persuaded that the granting of a suspended sentence in the instant case would significantly promote obedience to the law prohibiting the unlawful delivery of marijuana.

[Filed in the Court of Criminal Appeals of the State of Oklahoma, June 23, 1981]

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| MARVIN NEILSON, Appellant, | ) | |
| -vs- | ) | No. F-79-200 |
| THE STATE OF OKLAHOMA, Appellee. | ) | |

ORDER DENYING PETITION FOR REHEARING

On May 27, 1981, this Court entered its opinion affirming the appellant's conviction in the District Court of Grant County, their Case No. CRF-78-4, and a petition for rehearing has now been filed in this cause.

After considering this petition and reviewing the record, this Court finds that the petition for rehearing should be, and the same is, therefore, denied.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this *23rd* day of *June*, 1981.

(s) *Tom Brett*
PRESIDING JUDGE

(s) *Hez J. Bussey*
JUDGE

ATTEST:
(s) *Ross N. Lillard, Jr.*, Clerk

[Filed in the Court of Criminal Appeals
of the State of Oklahoma, Aug. 14, 1981]

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| MARVIN NEILSON, Appellant, | ] | |
| vs. | ] | No. F-79-200 |
| STATE OF OKLAHOMA Appellee | ] | |

NOTICE OF INTENT TO APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOW COMES Marvin Neilson, the appellant, and hereby gives notice of his intention to appeal to the Supreme Court of the United States, the judgment of this court rendered on June 23, 1981 when it denied the petition for rehearing. The statute under which the appeal of this court is taken is 28 U.S.C. §1257 (2).

Respectfully submitted,

(s) *Stephen Jones*
JONES & GUNGOLL
P.O. Box 1549
Enid, Oklahoma 73701
ATTORNEY FOR APPELLANT

[Certificate of Mailing omitted in printing]

# Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
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CLERK

No. 81-367

# In the Supreme Court of the United States

OCTOBER TERM, 1981

MARVIN NEILSON,
*Appellant,*

VERSUS

STATE OF OKLAHOMA,
*Appellee.*

## BRIEF OF APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT OR PETITION FOR WRIT OF CERTIORARI

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November, 1981

## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a federal issue involving jury instructions which was not presented to the trial court and not decided by the Oklahoma Court of Criminal Appeals.

2. Whether the trial court violated the Fourteenth Amendment Due Process Clause by failing to instruct the jury on suspended and deferred sentences in the absence of a requested instruction and when such an instruction is improper under state law.

3. Whether the Oklahoma system permitting suspended and deferred sentences improperly discourages jury trial.

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No. 81-367

In the
Supreme Court of the United States
OCTOBER TERM, 1981

MARVIN NEILSON,
*Appellant,*

VERSUS

STATE OF OKLAHOMA,
*Appellee.*

**BRIEF OF APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT OR PETITION FOR WRIT OF CERTIORARI**

The Appellee (hereinafter State of Oklahoma), by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny review of the Opinion of the Oklahoma Court of Criminal Appeals entered on May 27, 1981.

## OPINION BELOW

The opinion below is unreported, but is incorporated herein as Appendix A.

## JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on May 27, 1981. A petition for rehearing was denied on June 23, 1981. The appellee (hereinafter defendant) asserts jurisdiction for appeal or alternatively for a writ of certiorari under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 63 O.S. Supp. 1975, § 2-401, provides in pertinent part:

> "A. Except as authorized by this act, it shall be unlawful for any person:
>
> "1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;
>
> "* * * *
>
> "B. Any person who violates this section with respect to:
>
> "* * * *
>
> "2. Any other controlled dangerous substance classified in Schedule I, II, III, or IV is guilty of a felony and shall be sentenced to a term of imprisonment for not less than two (2) years nor more than ten (10) years and a fine of not more than Five Thousand Dollars ($5,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation except where the con-

viction is for a first offense. The provisions of this paragraph shall be applicable to all cases under this paragraph whether or not judgment and sentence on the effective date of this act have become final."

Title 22 O.S. 1971, § 926, provides:

"Punishment, jury may assess, when.—In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."

Title 22 O.S. 1971, § 927, provides:

"Punishment, court to assess, when.—Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render the judgment accordingly."

Title 22 O.S. Supp. 1975, § 982, provides:

"Presentence investigation.—Whenever a person is convicted of a felony except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a presentence investigation to be made by the Division of Probation and Parole of the Department. The Division shall thereupon inquire into the circumstances of the offense, and the criminal record, social history and present condition of the convicted person; and shall make a report of such investigation to the court, including a recommendation as to appropriate sentence, and specifically a

recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion of the court or the Division, it is desirable, the investigation shall include a physical and mental examination of the convicted person. The reports so received shall not be referred to, or be considered, in any appeal proceedings. Before imposing sentence, the court shall advise the defendant or his counsel and the district attorney of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. If either the defendant or the district attorney desires, such hearing shall be ordered by the court providing either party an opportunity to offer evidence proving or disproving any finding contained in such report, which shall be a hearing in mitigation or aggravation of punishment.

"If the district attorney and the defendant desire to waive such presentence investigation and report, both shall execute a suitable waiver subject to approval of the court, whereupon the judge shall proceed with the sentencing."

Title 22 O.S. Supp. 1978, § 991a, provides in pertinent part:

"Sentence—Powers of court.—Whenever a person is convicted of a crime and no death sentence is imposed, the court shall either:

"1. Suspend the execution of sentence in whole or in part, with or without probation. The court may, at time of sentencing or at any time during the suspended sentence, in addition:

"a. order restitution to the victim according to a schedule of payments established by the sentencing court if the defendant agrees to pay such restitution or, in the opinion of the court, if he is able to pay such restitution without imposing manifest hardship on the defendant or his immediate family and if the extent of the damage to the victim is determinable with reasonable certainty, and/or

"b. order the person convicted to engage in a term of community service without compensation, according to a schedule consistent with the employment and family responsibilities of the person convicted.

"Provided, however, that any such order for restitution and/or service shall be made in conjunction with probation and will be made a condition of the suspended sentence; or

"2. Impose a fine prescribed by law for the offense, with or without probation or commitment and with or without restitution or service as set forth above; or

"3. Commit such person for confinement provided for by law."

Title 22 O.S. Supp. 1976, § 991c, provides:

"Deferred judgment procedure.—Upon a verdict or plea of guilty, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation under the supervision of the State Department of Corrections upon the conditions of probation prescribed by the court. The court shall first consider restitution, administered in accordance with the provisions pertaining to restitution set forth above, among the vari-

ous conditions of probation it may prescribe. Upon completion of the probation term, which probation term under this procedure shall not exceed two (2) years, the defendant shall be discharged without a court judgment of guilt, and the verdict or plea of guilty shall be expunged from the record and said charge shall be dismissed with prejudice to any further action. Upon violation of the conditions of probation, the court may enter a judgment of guilt and proceed as provided in Section 991a of this title. The deferred judgment procedure described in this section shall only apply to defendants not having been previously convicted of a felony."

## STATEMENT OF THE CASE

On September 5, 1978, the defendant was convicted at jury trial of the offense of unlawfully distributing marijuana in violation of 63 O.S. Supp. 1975, § 2-401. The jury assessed punishment at two years imprisonment. The defendant appealed to the Oklahoma Court of Criminal Appeals, which affirmed the conviction on May 27, 1981, and denied rehearing on June 23, 1981. The defendant seeks review of the decision of the Court of Criminal Appeals.

At trial the State introduced evidence to show that Vatchie Duane Staggers was asked to try to buy marijuana from the defendant on March 14, 1978. Officers searched Staggers personally and also searched his car before following him to the defendant's home (Tr. 9-10). Once at the defendant's home, Staggers asked the defendant to sell him some bags (Tr .16). The defendant tossed Staggers a paper sack containing two plastic bags of marijuana (Tr. 16). Staggers put money previously given him by the officers on the defendant's table and left (Tr. 18). After leaving

the defendant's home, Staggers drove directly to a local airport where he gave the marijuana to the officers who had been following him (Tr. 18-19). Sheriff's Deputy John Kugel testified that he had followed Staggers to and from the defendant's home, received the marijuana and kept it in the evidence vault until he took it to the crime lab in Oklahoma City (Tr. 44-45). Richard Dill, a forensic chemist for the Oklahoma State Bureau of Investigation, performed a microscopic examination, a thin layer chromatography test and a modified Dugenois-Levine test on the contents of the baggies and determined it to be marijuana (Tr. 54-59).

In his own case, the defendant testified that Staggers had tried to sell marijuana, not buy it, and that the defendant himself had sold no marijuana to Staggers (Tr. 66-67). The defendant requested no jury instruction on deferred or suspended sentencing, although he did request two other instructions.

After trial but before sentencing, the defendant changed lawyers (Tr. 94). The defendant requested a presentence investigation and one was ordered (Tr. 94-95). The defendant's new lawyer argued his Motion for New Trial, mentioning his jury instruction theory for the first time. The court denied the motion (Tr. 102-106). Then counsel orally moved for a deferred or suspended sentence. This motion was also denied and the court sentenced the defendant according to the jury's assessment (Tr. 107-114).

## REASONS FOR DENYING REVIEW

### I. THIS COURT LACKS JURISDICTION BECAUSE THE COURT BELOW DECIDED THE ISSUE CORRECTLY ON INDEPENDENT STATE GROUNDS.

At trial the defendant did not request a jury instruction on deferred or suspended sentences. Under Oklahoma law the failure to request a jury instruction operates as a waiver unless the Court of Criminal Appeals is convinced that the lack of the instruction constitutes a substantial violation of the defendant's rights. *Oliver* v. *State*, 568 P.2d 1327, 1329 (Okl.Cr. 1977). The substance of the defendant's theory was not included in the written Motion for New Trial and was presented for the first time orally in argument on the Motion for New Trial (Tr. 102-103).

Defendant's theory runs contrary to the Oklahoma statutes establishing sentencing procedures. Title 22 O.S. 1971, § 926, provides that the jury may assess the punishment and the "court *shall* render a judgment according to such verdict, except as hereinafter provided." (Emphasis added) The court may assess punishment whenever the jury convicts but cannot agree on punishment or does not declare the punishment in its verdict. 22 O.S. 1971, § 927. The court may order a detailed presentence investigation before deciding whether or not to grant probation. 22 O.S. Supp. 1975, § 982. The court then has discretion to suspend the execution of the sentence with or without probation and with or without restitution to the victim or with or without imposing a fine where appropriate. 22 O.S. Supp. 1978, § 991a. The court also has discretion to defer sentencing and order probation with or without restitution

to the victim during the probationary period. 22 O.S. Supp. 1976, § 991c. Nowhere in the statutes is the jury given authority to suspend execution of a sentence or to defer sentencing during a period of probation.

The defendant's position also runs contrary to the case law in Oklahoma. A jury recommendation to suspend execution of a sentence is surplusage, improper and not binding on the trial court. *Riddle* v. *State*, 374 P.2d 634, 636 (Okl.Cr. 1962). Also, neither the prosecution nor the defense may argue to the jury the possibility of pardon, parole or suspended or deferred sentences since these matters are beyond the province of the jury. *Kovash* v. *State*, 519 P.2d 517, 522 (Okl.Cr. 1974), *cert. denied*, 419 U.S. 830, 95 S.Ct. 52, 42 L.Ed.2d 55 (1974). Finally, the defendant is not entitled to a jury instruction raising the possibility of a suspended sentence because the decision to suspend rests on factors beyond the province of the jury. *Miller* v. *State*, 522 P.2d 642, 644 (Okl.Cr. 1974). Thus, as a matter of state statutory and case law, there is no right to a jury instruction on deferred or suspended sentences even if one is requested.

The Oklahoma Court of Criminal Appeals did not decide the appeal on federal grounds. Indeed, the court below nowhere mentions the defendant's constitutional theory, perhaps because it was deemed waived by the defendant's failure to request the proper jury instruction at trial. Such waiver may constitute an independent state procedural ground barring this Court's review of the federal issue. See *Webb* v. *Webb*, ..... U.S. ....., ....., 101 S.Ct. 1889, 1892, 68 L.Ed.2d 392, 398 (1981), n.4 (state court rule requiring

citation of authority may bar review of unsupported federal issue). As in *Webb*, the Oklahoma court below failed to discuss or even mention the federal issue and, therefore, this Court should not review that issue. It has long been the law that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb* v. *Pitcarin*, 324 U.S. 117, 125, 65 S.Ct. 459, 463, 89 L.Ed. 789, 794 (1945). Justice White, acting individually, has pointed out that this Court's appellate jurisdiction over state courts extends only to final judgments with respect to issues of federal law. *New York Times* v. *Jascalevich*, 439 U.S. 1317, 1318, 99 S.Ct. 6, 8, 58 L.Ed.2d 25, 28 (1978). This case does not present a final state court decision on a federal question, and thus the Court is without jurisdiction.

## II. DUE PROCESS DOES NOT REQUIRE THE JURY TO DECIDE WHETHER TO SUSPEND OR DEFER SENTENCING.

Even if this Court has jurisdiction, the defendant was not denied due process and review is unnecessary. The defendant did not request a jury instruction embodying his constitutional theory. He was represented by counsel at trial and at sentencing. He requested and was granted a presentence investigation (Tr. 94-95). The trial court considered the contents of the presentence report and arguments of counsel before imposing sentence consistent with the jury verdict (Tr. 107-114). Thus, the defendant's constitutional issue is reduced to this: whether the trial court denied the defendant due process by failing to instruct the jury *on its own motion and contrary to Oklahoma law* that it could suspend or defer sentencing.

The defendant cites no authority to answer this question in the affirmative. The case of *Gardner* v. *Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), presented the Court with the special circumstances of a death penalty case in which confidential information in the presentence investigation was not disclosed to the defense. Even assuming that due process applies to sentencing, nothing in *Gardner* holds due process to require the jury to be instructed on the possibility of suspended or deferred sentencing. Nor does *Morissey* v. *Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), in holding that due process requires the basic right to notice and a hearing on a parole revocation, require the jury to be instructed on suspended or deferred sentences. Defendant's argument starts with the premise that due process applies to sentencing and then makes an inferential leap to the conclusion that due process requires the jury to decide whether to suspend or defer sentencing. This simply is not a jury question.

The defendant's sentencing was fundamentally fair. The defendant was represented by counsel and had an opportunity to be heard, even to the extent of a continuance of sentencing to prepare a presentence report. Nothing in existing law or logic requires the fundamental fairness standard of the Fourteenth Amendment Due Process Clause to call for a jury decision on suspending or deferring sentencing. That decision rests on considerations of judicial wisdom and discretion and the contents of the presentence report which may not even be admissible at trial. The defendant was fairly sentenced under the law.

## III. THE OKLAHOMA STATUTORY SCHEME DOES NOT IMPERMISSIBLY DISCOURAGE TRIAL BY JURY.

First, the Court should recall that the defendant himself had a jury trial. He was not deterred by the Oklahoma law. Thus, the defendant asserts not his own rights, but the rights of hypothetical defendants who may be deterred from exercising their rights to jury trial.

Unlike the Federal Kidnapping Act provisions condemned in *United States* v. *Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Oklahoma statutes do not discourage trial by jury with the risk of a death sentence which only the jury can impose. The trial court in Oklahoma has the authority to suspend or defer sentencing whether or not the defendant chooses trial by jury. Thus, no defendant faces the risk of greater punishment by exercising the right to jury trial. In no event must a defendant risk the death penalty in order to get a jury trial. The qualitative difference between death and deferred sentencing makes any disincentive merely incidental to a humane sentencing procedure.

This Court has held that a prosecutor neither violates due process nor improperly discourages jury trials by threatening to file more severe charges during plea negotiations so long as the defendant is free to accept or refuse the offered agreement. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363-64, 98 S.Ct. 663, 668, 54 L.Ed.2d 604, 610-611 (1978). By necessary implication, it is proper to encourage a plea bargain by offer of lesser punishment in the form of a suspended or deferred sentence, even if that offer inci-

dentally persuades the defendant to forego his right to plead not guilty. Confronting a defendant with the risk of more severe punishment at trial clearly may have a discouraging effect on the defendant's assertion of his trial rights, but the imposition of these difficult choices is an inevitable — and permissible — attribute of any legitimate system which tolerates and encourages the negotiation of pleas. *Id.*, 434 U.S. at 364, 98 S.Ct. at 668, 54 L.Ed.2d at 611.

The statistical evidence offered by the defendant does not support the conclusion that the Oklahoma law discourages jury trials because that evidence shows no causal link between the law and entry of guilty pleas. In the real world some cases may be handled by plea agreements and some may not. The cases which cannot be handled by plea agreement go to trial. These cases are likely to be the more severe felony cases in which probation is not appropriate. Thus, the fact that cases tried to a jury rarely result in probation does not indicate that the law itself discourages trials.

## CONCLUSION

While this Court's Rule 17 is not, by its own terms, exclusive in setting out grounds for exercise of the Court's discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court seeks to consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any state. Nor does the Court need to exercise its supervisory powers herein. The defendant alleges no great dispute between the highest courts of any states on any sub-

stantial federal question. No federal question requiring the attention of this Court is urged.

The Oklahoma Court of Criminal Appeals did not reach the federal issue which was not properly raised in the trial court. This Court lacks jurisdiction to review a state court decision resting, as here, on independent and adequate state grounds. Even so, the Oklahoma procedures for suspended or deferred sentences neither deny defendants due process nor improperly discourage jury trials. The defendant herein went to trial by jury and was fairly sentenced in a hearing where he was represented by counsel. The sentencing procedure was fundamentally fair. The State of Oklahoma respectfully requests the Court to deny review of this case.

Respectfully submitted,

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*Attorneys for Respondent*

November, 1981

# APPENDIX A

[Filed May 27, 1981]

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| MARVIN NEILSON, Appellant, | ) | |
| -vs- | ) | No. F-79-200 |
| THE STATE OF OKLAHOMA, Appellee. | ) | |

## OPINION

BRETT, Presiding Judge:

The appellant was arrested and charged with Unlawful Delivery of Marijuana in violation of 63 O.S.1971, § 2-401, several days after he had sold marijuana to a police informant. The informant had been sent to the appellant's mobile home by the district attorney for the sole purpose of attempting to purchase marijuana. The appellant was convicted by a jury in the District Court of Grant County, Oklahoma, Case No. CRF-78-4, and he was sentenced to two (2) years' imprisonment.

In his first two assignments of error, appellant maintains that he should have been acquitted because the defense of entrapment was clearly established at trial. This Court has said that: " 'Entrapment' is the planning of an offense by an officer, or is [sic] someone acting under his direction and his procurement by improper inducement of its commission *by one who would not have perpetrated it, except for the trickery of the officer.*" (Citations omitted) *Robinson* v. *State*, 507 P.2d 1296 (Okl.Cr.1973), at 1299. The record reveals that the informant's act of procuring marijuana from the appellant did not constitute entrapment. Further, an entrapment defense must follow admission to the act charged. The simultaneous assertion of improper inducement to commit a crime and denial of having committed the act negates the entrapment defense.

The appellant failed to adequately assert entrapment at trial. Not only did he fail to admit selling marijuana to the informant, he persisted in maintaining that the informant had tried to sell marijuana to him. The first reference to entrapment came during defense counsel's closing argument.

As his second attempt to establish entrapment, the appellant argues that, because the police persuaded the informant to secure the evidence, entrapment was established. Contrary to the appellant's argument, however, the fact that the police persuaded the informant to secure the evidence is irrelevant.

In his forth proposition of error, it is argued that the court erred when it granted the State's motion to strike the testimony of Floyd Young, the appellant's employer, on the ground that the character evidence he provided was not based on community reputation. On cross-examination, the following testimony was given by Mr. Young:

> Q: But, as far as the general reputation in the community, you are not basing it, your testimony, on that, are you? You are basing it on your personal knowledge?
>
> A: Personal knoweldge is all I have to go by.
>
> Q: Not reputation in the community?
>
> A: Well, I don't know of any other reputation.

A character witness is required to base his testimony on general reputation rather than personal opinion. *McDonald* v. *State*, 317 P.2d 775 (Okl.Cr.1957).[1] Mr. Young testified that he did not know of any reputation other than of his personal knowledge. Since he could not testify as to appellant's community reputation, the trial court correctly excluded his testimony from the consideration of the jurors.

---

[1] The New Evidence Code, which was not effective as of the date of this trial, has codified this rule, 12 O.S.Supp.1980, § 2803(21).

It is next contended that the appellant was denied competent assistance of counsel, which allegation he supports with acts allegedly reflecting this ineffectiveness. The standard by which this claim has been reviewed was recently promulgated in *Johnson* v. *State*, 620 P.2d 1311 (Okl. Cr.1980). In *Johnson*, this Court abandoned the sham and mockery test and adopted that of reasonably competent assistance of counsel, which had been adopted by the Tenth Circuit Court of Appeals. See *Dyer* v. *Crisp*, 613 F.2d 275 (10thCir.1980).

The appellant's allegation of inadequate representation at trial is not supported by the record. He first charges that his attorney failed to adequately prepare or investigate relevant facts and law, but the transcript of the trial indicates that the preparation was adequate. He then finds error in the failure of counsel to rehabilitate Mr. Young's testimony. However, trial tactics are not indicative of incompetence. Finally, the appellant argues that his attorney did not adequately develop the evidence of entrapment at trial and failed to submit requested instructions placing the State under the burden of proving beyond a reasonable doubt that he was not entrapped. But, since the record clearly indicates that there was no entrapment, any alleged defect in the development of that defense or failure to request certain instructions is irrelevant. It is the opinion of this Court that the conduct and assistance of counsel was reasonably competent.

It is next urged that the circumstantial evidence was insufficient to sustain the verdict of guilt. It has long been recognized that a criminal case may be proved circumstantially and that the jury has the exclusive province of applying the evidence. *Logan* v. *State*, 493 P.2d 842 (Okl. Cr.1972). This Court's only concern is whether a prima facie case was established justifying submission of the case to the jury. *Renfro* v. *State*, 607 P.2d 703 (Okl.Cr.1980).

The evidence presented in the instant case reveals that a prima facie case was established. The police searched

both the informant and his car for marijuana before he drove to the appellant's house. The officers followed him there and then waited outside for him. When he came out, he was followed again to a place where he stopped and gave the officers two baggies of marijuana. Also, the informant gave direct testimony that the appellant sold him the marijuana. This evidence is sufficient to establish a prima facie case, and it was properly submitted to the jury, whose decision will not be reversed on appeal.

Finally, we consider the appellant's argument in assignments number three and six that the trial court erred in not instructing the jury that it could recommend a deferred or suspended sentence, and that the court abused its discretion in refusing to grant a deferred or suspended sentence.

The jury's province is the determination of fact involving the guilt or innocence of the accused. It is not the jury's duty to determine whether or not to suspend or defer a sentence. *Miller* v. *State*, 522 P.2d 642 (Okl.Cr. 1974). The court makes this determination on factors outside the realm of the jury's consideration, and, thus, there is no basis for the trial court to instruct the jury regarding a recommendation of a suspended sentence.

It has long been the rule that this Court will not interfere with the decision of the trial court to deny a suspended sentence in the absence of an abuse of discretion. *Mixon* v. *State*, 549 P.2d 362 (Okl.Cr.1976); *Babb* v. *State*, 532 P.2d 477 (Okl.Cr.1975). However, the evidence before this trial court amply supported a suspended sentence. The appellant, a first offender, was married, a father, and was employed at the time of trial. There does not appear to be a compelling need to remove him from the community. The appellant is advised to consider the provision of 22 O.S. Supp.1980, § 994, and to apply again for a suspended sentence under those provisions. In reconsidering his application for a suspended sentence, the trial court may be

persuaded by his conduct during the time he has been free on bond, pending the disposition of this appeal.

The judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY, OKLAHOMA
THE HONORABLE J. RUSSELL SWANSON, JUDGE

MARVIN NEILSON, appellant, was convicted in the District Court of Grant County, Oklahoma, case no CRF-78-4, of Unlawful Distribution of Marijuana and punishment set at two (2) years' imprisonment and appeals. AFFIRMED.

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OPINION BY BRETT, P.J.
CORNISH, J., CONCURS
BUSSEY, J., SPECIALLY CONCURRING

BUSSEY, J., SPECIALLY CONCURRING:

While I agree that the judgment and sentence should be affirmed, I am not persuaded that the granting of a suspended sentence in the instant case would significantly promote obedience to the law prohibiting the unlawful delivery of marijuana.